Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of Implementation of Section 621(a)(1) of **the** Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)))))))	MB Docket No. 05-311

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE U.S. CONFERENCE OF MAYORS, THE ALLIANCE FOR COMMUNITY MEDIA, AND THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY IN RESPONSE TO THE FURTHER NOTICE OF PROPOSED RULEMAKING

James N. Horwood
Tillman L. Lay
Gloria Tristani
Ruben D. Gomez
SPIEGEL & MCDIARMID
1333 New Hampshire Avenue, N.W.
Second Floor
Washington, D.C. 20036
(202) 879-4000

*Counselfor **NATOA** et al.*

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SUMMARY

At the outset, we must again reiterate our strong disagreement with the findings in the *Order* accompanying the *FNPRM*, which we believe are in many respects clearly contrary to the Cable Act and other applicable law, and are arbitrary and capricious. Numerous other commenters shared our views about the *Order*. Subject to that substantial caveat, our reply comments follow.

1. **The record confirms that the findings of the *Order* should not be applied to incumbent cable operators.** The majority of commenters urged the Commission not to apply the *Order's* findings to incumbents at all. They pointed out that the *Order* hinges entirely on Section 621(a)(1), which is totally inapplicable to incumbent cable operators. Incumbent cable operators disagreed, with most arguing that three of the *Order's* findings – the franchise fee, PEG/I-Net and mixed-use aspects of the *Order* – should apply to incumbents immediately. But, Section 611's legislative history and its interpretation by the courts are crystal clear that Section 611 grants the Commission no substantive authority at all. It merely codifies preexisting local government authority to require cable operators to provide PEG capacity and facilities. With regard to Section 622, incumbent cable operators point to no concrete significant dispute between LFAs and incumbent operators concerning franchise fees, much less one "directly impinging" on national policy *and* implicating the FCC's expertise.

The majority of commenters that addressed the question, including most incumbent cable operators, agreed with us that the "shot clock" and buildout aspects of the *Order* cannot be applied to incumbent cable operators.

NCTA and Time Warner are wrong in asserting that the "mixed-use networks" aspects of the *Order* should apply to incumbent cable operators. The mixed-used networks aspects of the

Order are predicated on an assumption that does not apply to incumbent cable operators: The presence of a would-be cable entrant ILEC's preexisting telecommunications network in the local public rights-of-way.

Time Warner's and Charter's claims that the franchise institutional network ("I-Net") requirements are "unrelated to the provision of cable service" and that therefore incumbents should be immediately relieved of them are doubly-flawed. First, the claim that I-Nets **are** not cable-related is directly contradicted by the Section 611. Second, Time Warner's and Charter's arguments are essentially a disguised, and untimely, effort to seek reconsideration of the ***Order.*** If, as the ***Order*** states, non-duplicative, redundant I-Net requirements can be imposed on new entrants, imposing I-Net requirements on incumbents is permissible.

Time Warner's argument that the Commission should clarify that **GAAP** applies to calculating the 5% franchise fee limit is flawed on several levels. **As** an initial matter, it is plainly beyond the scope of the *FNPRM*. Moreover, while we do not disagree that GAAP is a relevant consideration in construing the meaning of "gross revenue" in Section 622, it does not follow that **GAAP** *is* dispositive. Indeed, Time Warner's own **GAAP** citations make clear that gross revenue classification and revenue recognition are matters that depend on the specific facts and circumstances of each underlying transaction,

Some commenters urge the Commission to adopt rules defining "commercial impracticability" within the meaning of Section 625 and to use Section 625 to modify franchises in light of the ***Order.*** **As** an initial matter, these Section 625 proposals are beyond the scope of' the *FNPRM*, and as with the renewal provisions of Section 626, the Commission has no jurisdiction to construe or enforce the modification provisions of Section 625. But these Section 625 modification arguments are also substantively wrong, both as to Section 625 generally, and to Section 625's "commercial impracticability" standard in particular. The modification provisions, and as Uniform Commercial Code precedent makes clear, the meaning of "commercial impracticability," are inherently fact-specific, situation-specific, determinations. Commercial impracticability cannot be shown here. The advent of competition was certainly foreseeable. Moreover, the law is clear that the mere fact that a changed condition might increase a party's costs, or increase its costs vis-a-vis those of a competitor, is not sufficient to satisfy the financial hardship prong of the "commercial impracticability" standard.

2. If applied to incumbent cable operators at all, the *Order's* findings cannot and should not be applied before the expiration of an incumbent's current franchise agreement. Incumbent cable operators show no actual concrete financial harm that they would suffer from continuing to abide by their current franchises until they expire. Incumbent cable operators conveniently seem to forget that the Cable Act provisions on which they purport to rely have existed in their present form for a long time and were in effect when virtually all current franchises were negotiated. As sophisticated and knowledgeable franchise negotiators that voluntarily entered into their franchise agreements, incumbent cable operators cannot honestly claim that continuing to abide by existing franchise agreements for their remaining term will materially harm them in any way,

Equally important, LFAs' reliance on the agreements reflected in their existing franchises is fully justified. In the fifteen years since the 1992 Cable Act, the Commission has never previously construed, or even claimed the authority to construe, Section 621(a)(1) until the fall of 2005 when the original *NPRM* in this proceeding was issued; the Commission has likewise never previously construed or claimed the authority to construe Section 611 in the twenty-three years since the 1984 Cable Act was originally enacted; and the Commission has consistently adhered to its franchise fee forbearance policy with respect to Section 622 since it was adopted over twenty years ago. Indeed, it is difficult to imagine circumstances of more justifiable reliance by LFAs.

Applying the ***Order's*** findings immediately to incumbent's current franchise agreements would visit substantial hardship not only on LFAs, but on their residents, PEG centers, and on local schools, libraries, and fire and police departments. Any attempt to apply the ***Order's*** findings (particularly its franchise fee and PEG/I-Net findings) to existing franchises will invariably result in a host of new disputes, and potential litigation, about whether or not the language in a particular franchise agreement is, or is not, consistent with the ***Order's*** findings.

One aspect of the ***Order*** that will unquestionably have an immediate and substantially adverse impact on schools, libraries, and fire and police stations across the nation is the ***Order's*** holding that "free or discounted services provided to an LFA" may be a "franchise fee." The vast majority of local franchises in effect today require the incumbent cable operator to provide free basic cable service (and sometimes expanded basic service) to schools, libraries, police and fire stations and certain other local government locations. The Commission itself apparently once believed that free service to schools was not a franchise fee and, in addition, was "a significant public benefit." Faced with the alternative of general budget revenue losses that would result if incumbent cable operators were immediately to start to offset the cost of free service to schools, libraries and other public institutions against franchise fees they otherwise owe, some LFAs will have no choice but to abandon such free service requirements in existing franchises. That will leave many already cash-strapped local schools and libraries unable to pay to keep these services for their students and patrons. The same is true of many local fire and police departments, who rely on such franchise provisions to provide cable service to their firefighters and police at local fire and police stations.

The hardships faced by LFAs, PEG centers and their constituents would be substantial, immediate and irreparable. Against that, the record reveals no significant material harms to incumbent cable operators if the *Order's* findings were not applied to them until their current franchises expire. Application of the *Order's* findings to existing franchises would therefore be arbitrary and capricious under the balancing of hardships test

Applying the *Order's* rulings to existing franchise agreements entered into long before this proceeding was even contemplated, much less initiated, also would constitute impermissible retroactive rulemaking. The Communications Act provisions establishing the Commission's general rulemaking power contain no express authorization of retroactive rulemaking. The relevant "conduct" here is the entry into a franchise agreement by an LFA and an incumbent cable operator.

Even if the Commission could permissibly apply the *Order's* findings to existing franchise agreements immediately (and we think it cannot), deciding to apply those findings only at the expiration of existing franchises, as the *FNPRM* tentatively concludes, is well within the Commission's discretion.

3. Verizon's and AT&T's efforts to circumvent Section 632(d)(2) fail. Commenters virtually unanimously agree that the Commission should adopt its tentative conclusion concerning Section 632(d)(2). Only Verizon and AT&T sought to sidestep the tentative conclusion. But the only way to read Section 632(d)(2) together with Sections 621(a)(1) and 706 is to conclude that Congress has determined in Section 632(d)(2) that state and local customer service laws and franchise cable customer service standards that exceed the

Commission's standards do ***not,*** by definition, constitute an "unreasonable refusal" under Section **621**(a)(1), nor do they frustrate broadband deployment within the meaning of Section **706.** Moreover, Congress' judgment was a wise one. The record shows that more stringent customer service standards than the Commission's are very much needed in the cable market, even in those markets where head-to-head competition exists.

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REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE U.S. CONFERENCE OF MAYORS, THE ALLIANCE FOR COMMUNITY MEDIA, AND THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY IN RESPONSE TO THE FURTHER NOTICE OF PROPOSED RULEMAKING

The National Association of Telecommunications Officers and Advisors ("NATOA"), the National League of Cities ("NLC"), the National Association of Counties ("NACo"), the U.S. Conference of Mayors ("USCM')),the Alliance for Community Media ("ACM), and **the** Alliance For Communications Democracy ("ACD"), submit these reply comments in response to opening comments filed to the Further Notice of Proposed Rulemaking, released March 5, 2007, in the above-captioned proceeding ("*FNPRM*").

INTRODUCTION

At the outset, we must again reiterate our strong disagreement with the findings in the *Order*[1] accompanying the *FNPRM*, which we believe are in many respects clearly contrary to the Cable Act and other applicable law, and are arbitrary and capricious. Numerous other commenters shared our views about the *Order*.[2] We, along with other local governments, have petitioned for court review of the *Order*.[3] Like our opening comments, these reply comments assume, solely for the purposes of argument (as we must, given the procedural posture of the *Order* and the *FNPRM*), that the findings of the *Order* might stand, even though we believe they will not.

Subject to that substantial caveat, our reply comments follow

The majority of opening comments urged the Commission (1) not to apply the findings of the *Order* to incumbent cable operators; and (2) to adopt the *FNPRM*'s tentative conclusion regarding § 632(d)(2). Out of approximately 124 opening comments filed, most, including the comments by local franchising authorities ("LFAs") and public, educational and governmental ("PEG") organizations and users, agreed with our position on both of these issues.

With respect to the applicability of the *Order's* findings to incumbent cable operators, LFAs and PEG organizations and users were unanimous in their view that those findings should

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[1] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order, FCC 06-180 (rel. March 5,2007) ***("Order").***
[2] *See, e.g.*, NCTA Comments at 2-5; Time Warner Comments at i-ii, 2-3; Fairfax County Comments at 1-5; Great Metro Telecommunications Consortium, the City of Colorado Springs, Colorado and the City of Tacoma, Washington ("GMTC") Comments at 2-3; Comments of Anne Arundel County, MD, the City of Carlsbad, CA, the City of Dubuque, IA, the City of Laredo, TX, Montgomery County, MD, the City of Redondo Beach, CA, the City of St. Louis, MO, and the City of Wilmington, DE ("Local Community Coalition") at 2; Initial Comments of the Burnsville/Eagan Telecommunications Commission, the City Minneapolis, MN, the North Metro Telecommunications Commission; the North Suburban Communications Commission, the City of Renton, WA, and the South Washington County Telecommunications Commission ("the LFAs") at 5-7.
[3] *See ACM v. FCC*, No. 07-3391 (consolidated) (6th Cir. tiled April 3, 2007).

not apply. Moreover, Verizon and AT&T agreed that those findings should not apply until incumbents' current franchises expire.[4] Not surprisingly, incumbent cable operators took the opposite view, claiming that the ***Order's*** findings should apply to them immediately[5] or, in the case of at least one competitive incumbent operator, when competition occurs in the market.[6] Even most incumbent cable operators, however, appear to agree that at least two of the ***Order's*** findings – those related to the "shot clock" and buildout requirements – should not be applicable to incumbents at all.[7]

With regard to the Section 632(d)(2) customer service standards issue, the record reveals nearly unanimous support for the ***FNPRM's*** tentative conclusion that the provision means what it says: The Commission is barred from preempting state and local customer service laws that exceed the Commission's customer service standards, and from preventing LFAs and cable operators from agreeing to more stringent standards. Only two commenters, Verizon and AT&T, voiced any hesitance on this issue, but their hesitation, while certainly unsurprising, stems primarily from their disagreement with Section 632(d)(2), something the Commission is powerless to change.

In sum, there is ample support for the Commission to reject the ***FNPRM's*** tentative conclusion to apply the ***Order's*** findings to incumbent operators, and to adopt the ***FNPRM's*** tentative conclusion concerning § 632(d)(2).

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[4] Verizon Comments at 10-11. *See* AT&T Comments.

[5] *E.g.*, NCTA Comments at 7-20; Time Warner Comments at 6-8; Charter Comments at 5-11; and FTTH Council Comments at 3-5.

[6] **See,** *e.g.*, RCN Comments at 5, 7-9.

[7] ***See,*** NCTA Comments at **3;** Time Warner Comments at 4; Charter Comments at 1-2.

I. THE RECORD CONFIRMS THAT THE FINDINGS OF THE *ORDER* SHOULD NOT BE APPLIED TO INCUMBENT CABLE OPERATORS.

The majority of commenters urged the Commission not to apply the ***Order's*** findings to incumbents at all. They pointed out that the ***Order*** hinges entirely on Section 621(a)(1), which is totally inapplicable to incumbent cable operators.*

Incumbent cable operators disagreed, with most arguing that three of the ***Order's*** findings – the franchise fee, PEG/I-Net and mixed-use aspects of the ***Order*** – should apply to incumbents immediately: while at least one commenter argued that the findings should apply when competition occurs.[10] Some cable operators also attempted to inject into the *FNPRM* new arguments that are beyond the scope of the *FNPRM.*

All of the cable industry's arguments *are* misguided, as we now show.

A. Sections 611 and 622 Do Not Furnish A Basis for Applying the *Order's* Findings to Incumbents.

Recognizing that Section 621(a)(1) provides no authority for the *FNPRM*'s proposal to apply the ***Order's*** findings to incumbents, NCTA and incumbent cable operators assert that such authority can be found in Sections 611(a) and 622." They overlook, however, two critical points.

First, as pointed out in our opening comments, Section **61**1's legislative history and its interpretation by the courts are crystal clear that Section 611 grants the Commission no

[8] ***See, e.g.,*** LFAs' Comments at 10-17; Fairfax County Comments at 6-7; City of New York Comments at 3; League of Minnesota Cities, *et al.* Comments at 3; City of Philadelphia Comments at 2; Miami-Dade County Comments at 4; San Francisco Community Television Corporation Comments at 2; Portland Community Media Comments at 2; Manhattan Neighborhood Network Comments at 2; Community Access Television Fayetteville Comments at 2-3; Fairfax Cable Access Corporation Comments at 3; Capital Community Television Comments at 2.

[9] NCTA Comments at 9-20; Time Warner Comments at 6-8, 11-14; and Charter Comments at 3-11.

[10] ***See*** RCN Comments at 5, 7-9.

[11] NCTA Comments at 4, 15-18; Time Warner Comments at 5 & 12; Charter Comments at 3-5 & 9-11.

substantive authority at all. It merely codifies preexisting local government authority to require cable operators to provide PEG capacity and facilities."

Second, even under the Commission's own franchise fee forbearance policy, it will exercise jurisdiction over franchise fee matters only where the dispute "directly impinges as a national policy concerning communications *and* implicates the agency's expertise."[13] But with one exception discussed in Part II(A) below, incumbent cable operators point to no concrete significant dispute between LFAs and incumbent operators concerning franchise fees, much less one "directly impinging" on national policy ***and*** implicating the FCC's expertise. There is nothing in the record that suggests that current franchise agreements negotiated by operators and LFAs are anything more than what common sense suggests they are: The result of arms-length negotiations setting forth the parties' understanding of what is a "franchise fee" within the meaning of Section 622. Immediate application of the ***Order's*** "franchise fee" findings to existing franchise agreements, in contrast, would frustrate the Commission's franchise fee forbearance policy by spawning a raft of new disputes and increased litigation over the meaning of franchise agreement language to which the LFA and operator have previously, and knowingly, agreed. ***See*** Part II(A)(2) *infra.*

B. Most Commenters Agree That the "Shot Clock" and Buildout Aspects of the *Order's* Findings Are Inapplicable to Incumbents.

The majority of commenters that addressed the question, including most incumbent cable operators, agreed with us that the "shot clock" and buildout aspects of the ***Order*** cannot be

[12] NATOA Comments at 9-11 (citing and quoting H.R. Rep. No. 934, 98th Cong., 2d Sess. at 30 ("*1984 House Report*); ***Time Wurner Entertainment v. FCC***, 93 F.3d 957, 972-73 (D.C. Cir. 1996); and ***ACLU v. FCC,*** 823 F.2d 1554, 1559 (D.C. Cir. 1987)).
[13] ***ACLU,*** 823 F.3d at 1973-74 (emphasis added).

applied to incumbent cable operators.[14] **A** few competitive incumbent cable operators argued otherwise,[15] but their arguments rest on either a misreading of Section ***626*** or a self-serving desire to reduce the scope of existing competition by reneging on their existing franchise buildout commitments, or both, and their claims should be rejected.

Knology (at 5-7) is the only party that suggests that the "shot clock" aspect of the ***Order*** should be applied to incumbents, although RCN also claims (at *6)* that the Commission has authority to "implement rules under Section ***626*** when operators seek renewal." They are both wrong.

Knology's argument rests on a fundamental misreading of Section ***626.*** Knology (at *6)* asserts, for instance, that a needs assessment under Section 626(a) "must not take more than six months," but that is flatly, and facially, incorrect: The only reference in Section ***626*** to "six months" is in Section 626(a), and the "six month period" referenced there is the window within which the operator must request, or the LFA must "commence" or "initiate," the needs assessment process. It says nothing about a deadline for completing that process, and given the three-year period allowed for the Section ***626*** renewal process, the suggestion that the needs assessment process should, much less must, be completed within six months is not only wholly unsupported by the statute's text, but also inconsistent with the overall renewal process timeframe of Section ***626.*** Knology's assertion (at *6)* that it would be "unreasonable for renewal decisions to take longer than four months from the date of a renewal request" is likewise flatly inconsistent with Section ***626's*** language in two ways. With respect to the formal franchise

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[14] NCTA Comments at ***7 &*** 9-20 ***(Order's*** franchise fee, PEG/I-Net and mixed use networks findings should apply to incumbents); Time Warner Comments at **4-9** & 11-14 (same); FTTH Council Comments ***at*** 3 ***("shot*** clock" and buildout findings of *Order* "arguably are relevant exclusively to new entrants (post-adoption of the ***[Order])").*** *See also* Charter Comments at 1-5. *See also* GMTC Comments at 8-9.

[15] *See* Comments of Knology at 5-9; RCN Comments at 6; WOW Comments at 11-13.

renewal process, Section 626(c)(1) gives an LFA four months either to renew the franchise or issue a preliminary assessment not to renew, and under Section 626(b) that deadline does not even begin to run until the LFA has completed the Section 626(a)(1) needs assessment process. With respect to the informal renewal process, Section 626(h) specifically says that an LFA may grant *or* deny an informal renewal proposal "at any time." Setting a time limit is, of course, inconsistent with "at any time."

RCN's claim that the FCC has rulemaking authority over Section 626 is simply wrong. The reasons why are set forth in our opening comments (at 9-10) and therefore need not be repeated here.

Competitive incumbent operators' assertions about the applicability of the ***Order's*** buildout findings to incumbents are equally misguided. As an initial matter, Knology (at 6-9) appears to be complaining about buildout requirements no more onerous than those imposed on its fellow incumbents, which would not be inconsistent with the ***Order*** (at ¶¶ 88-89). And Knology surely is not suggesting that the Commission is in any position to determine how "rocky," and how supposedly expensive, it is to build out discrete areas of Huntsville, Alabama. To the contrary, in the franchise renewal process in which Knology is apparently engaged, Section 626(c)(1)(D) calls for the LFA and, on appeal if the operator disagrees, a court to address the very kind of specific fact-finding and balancing of community needs against the cost of meeting those needs that Knology's buildout complaint raises.

Finally, competitive incumbents overlook a fundamental, underlying fact: The buildout requirements in their current franchises are requirements to which they voluntarily agreed. And Section 621(a)(1)'s prohibition against unreasonable refusals to award a competitive franchise was in place when they agreed to those requirements. So were all of the other applicable provisions of the Cable Act. Unless these competitive incumbent cable operators are claiming that they or their counsel were ignorant of the Cable Act or their rights under it (in which case their remedy, if any, lies against their counsel), their claims here are nothing more than an improper attempt to renege on contractual franchise commitments they voluntarily made. ***See*** Part II(B) *infra*.

C. The Incumbent Cable Industry Misapprehends the "Mixed-Use Network" Aspects of the *Order.*

NCTA (at 19-20) and Time Warner (at 13-14) assert that the "mixed-use networks" aspects of the *Order* should apply to incumbent cable operators. They are mistaken.

As we pointed out in our opening comments (at 14-15), the mixed-used networks aspects of the *Order* are predicated on an assumption that does not apply to incumbent cable operators: The presence of a would-be cable entrant ILEC's preexisting telecommunications network in the local public rights-of-way. In the case of an incumbent cable operator, in contrast, the preexisting right-of-way network is a cable system that is already providing cable service. An incumbent's network therefore, by definition, already falls squarely within the "cable system" definition of Section 602(7).

To be sure, it may be theoretically possible that an incumbent cable operator might install additional right-of-way facilities to its cable system that are devoted exclusively to non-cable services. But there is no evidence of that in this record. Unlike the case of ILECs, which are upgrading their narrowband networks to broadband networks to accommodate video and other broadband services, incumbent cable operators' systems, originally built and subsequently upgraded primarily for video service delivery, are already broadband networks.

D. Time Warner's and Charter's I-Net Arguments Are Inconsistent with the *Order* and Contrary to the Cable Act.

Time Warner (at 11-13) and Charter (at 11-14) claim that the franchise institutional network ("I-Net") requirements are "unrelated to the provision of cable service" and that therefore incumbents should be immediately relieved of them. The claim is doubly-flawed.

First, the claim that I-Nets are not cable-related is directly contradicted by the Cable Act. Section 611(f) defines "institutional network" broadly as a "communication network," not just a cable service network or cable system, and Section 611(b) specifically provides that LFAs may require "capacity on institutional networks." Institutional networks are therefore necessarily "cable-related," whether they are used for delivery of data, voice or other "communication network" purposes or not. Time Warner and Charter are wrong in suggesting otherwise.

Second, Time Warner's and Charter's arguments are essentially a disguised, and untimely, effort to seek reconsideration of the ***Order***. The ***Order*** (at ¶ 119) makes plain that requiring I-Nets, even of' new entrants under Section 621(a)(1), is permissible and consistent with the Cable Act. If non-duplicative, redundant I-Net requirements can be imposed on new entrants, imposing I-Net requirements on incumbents – whose I-Nets, being the original ones in a market, are by definition not duplicative – is permissible. Time Warner's and Charter's claims to the contrary are thus inconsistent with the ***Order***. Those claims have no place here; their relief, if any, from the ***Order*** would have been to seek reconsideration of or to appeal this aspect of the ***Order***, yet they have chosen neither.

E. Time Warner's GAAP Argument Is Beyond the Scope of the *FNPRM* and Is Based on a Misreading of GAAP

Time Warner (at 9) asserts that "some LFAs" – which ones and in what ways, Time Warner does not see fit to say – supposedly "seek to include gross amounts as part of the franchise fee that, [apparently in Time Warner's view] under GAAP [Generally Accepted Accounting Principles], cannot be recognized by the operator as revenue." Based on this nebulous, undocumented assertion, Time Warner goes on (at 9-11) to urge the Commission to "clarify" that for purposes of calculating the 5% franchise fee limit, a cable operator's gross revenues should be determined in accordance with GAAP.

Time Warner's GAAP argument is flawed on several levels. As an initial matter, it is plainly beyond the scope of the *FNPRM*, which addresses whether the ***Order's*** findings should be applied to incumbents, not whether the ***Order's*** findings themselves should be changed or revised. The proper forum for Time Warner's GAAP argument would be either to file a petition for rulemaking or a declaratory ruling, or to seek reconsideration of the ***Order.*** For this reason alone, its GAAP argument must be dismissed.

But Time Warner's GAAP argument suffers from several other defects as well. While we do not disagree that GAAP is a relevant consideration in construing the meaning of "gross rcvcnue" in Section 622, see ***Dallas v.*** *FCC*, 118 F.3d 393, 395 (5th Cir. 1997), it does not follow that GAAP is dispositive. To the contrary, in the analogous context of taxes, "the characterization of a transaction for financial accounting purposes, on the one hand, and for tax purposes, on the other, need not necessarily be the same."[16]

[16] ***Frank*** *Lyon* Co. *v. United States*, 435 U.S. 561, 577 (1978). ***See*** also, ***American Automobile Assn v.*** *United States*, 367 U.S. 687,693 (1961).

Moreover, Time Warner's GAAP citations (at 9-11) are misleading. Those citations make clear, for example, that gross revenue classification and revenue recognition "is a matter of judgment that depends on the relevant facts and circumstances."" In other words, labels, such as "agency commissions" or "launch fees," do not control; rather, the specific and particular facts of each underlying transaction control. Indeed, if Time Warner really believes GAAP should control, then it should immediately seek to persuade the Commission to overturn the Cable Services Bureau's decision in *Time Warner Entertainment*, Memorandum Opinion and Order, 14 FCC Rcd. 7678 (CSB 1999), since GAAP makes clear that "bad debts," just like "franchise fees," are "subscriber-related costs"[18] and, as such, like the franchise fees at issue in *Dallas*, cannot be deducted from "gross revenues."

F. The Section 625 Franchise Modification Provision Cannot Serve as a Basis for Applying the *Order's* Findings to Incumbent Franchise Agreements.

The FTTH Council argues (at 6-8) that, as a mechanism for shoehorning the *Order's* findings into existing franchises, the Commission should adopt rules defining "commercial impracticability" within the meaning of Section 625 such that competitive incumbent franchised operators "should be deemed to meet the commercial impracticability standard immediately" and that incumbent non-competitive operators should be deemed to meet that standard when a new entrant begins to build its network in the incumbent's area. Alcatel-Lucent (at 6-7) goes even further, arguing that the Commission may use Section 625 to modify, in blanket form, all existing franchises to conform new entrants' franchises. But these Section 625 modification

[17] Financial Accounting Standards Board ("FASB"), *Reporting Revenue Gross as a Principal versus Net as an Agent*, EITF Abstracts, Issue No. *99-19*, at ¶ *6* (Z000), *available c6* http//www.fasb.org/pdf/abs99-19.pdf.
[18] FASB, *Statement of Financial Accounting Standards No. 51*, "Financial Reporting by Cable Television Companies," at ¶ 17 (Nov. 1981, as amended) *available at* http//www.fasb.org/pdf/fas51.pdf (cited in *Dallas*, 118 F.3d at *395)*.

arguments are fundamentally wrong, both as to Section 625 generally, and to Section 625's "commercial impracticability" standard in particular.

We begin with the fact that, much like the industry arguments addressed in Parts I(D) and (E) above, these Section 625 proposals are beyond the scope of the *FNPRM*. Even if the Commission had the legal authority to adopt rules concerning Section 625 (and as noted below, it does not), it would be required to give the public notice and reasonable opportunity of those proposed rules, which the *FNPRM* does not do.

Moreover, as with the renewal provisions of Section 626, the Commission has no jurisdiction to construe or enforce the modification provisions of Section 625; that authority belongs to courts under Section 625(b)(1) and 635(a).[19] The modification provisions, and as Uniform Commercial Code precedent makes clear, the meaning of "commercial impracticability," are inherently fact-specific, situation-specific, determinations.[20] The Commission is therefore not in a position to make any blanket determination of commercial impracticability, much less to determine which provisions of the myriad different franchises in the country could or should be modified, and if so how, even if commercial impracticability were deemed to exist.

But commercial impracticability cannot be shown here. FTTH Council and Alcatel-Lucent are incorrect in suggesting that the advent of competition is somehow a "condition[] . . . the nonoccurrence of which was a basic assumption on which the [franchise]

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[19] *See* our opening comments at 9-10.

[20] *See Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283,293 (7th Cir., 1974); *Thrifty Rent-A-Cur Systems, Inc., v. South Florida Transport, Inc.*, 2005 U.S. Dist. LEXIS 38489 at *11 (N.D. Okla. 2005).

requirement was based."[21] Section 621(a)(1) has prohibited exclusive franchises, as well as unreasonable refusals to grant competitive franchises, since 1992. As for ILEC and, more particularly, RBOC entry into cable, that was one of the primary goals of the Telecommunications Act of 1996 which, among other things, repealed the telephone-cable crossownership prohibition. And, of course, the presence of DBS competition has existed for years as well. In negotiating both new competitive franchises and franchise renewals, incumbent operators have therefore long been keenly aware of the possibility of competition, and they have invariably relied heavily on the threat of competition in their franchise negotiations with LFAs for years as well

The Section *625* proposals also ignore that a mere change in conditions, even if it were not foreseeable (which it clearly should have been here), is not, standing alone, sufficient to constitute "commercial impracticability." Certainly nothing supports the assertions of the FTTH Council and Alcatel-Lucent that anything short of a precisely level playing field constitutes sufficient financial hardship to satisfy the commercial impracticability standard. To the contrary, the law is clear that the mere fact that a changed condition might increase a party's costs, or increase its costs vis-a-vis those of a competitor, is not sufficient to satisfy the financial hardship prong of the "commercial impracticability" standard. The "fact that performance has become economically burdensome or unattractive is not sufficient for performance to be excused."[22] The

[21] Section 625(f). Several federal and state court decisions have emphasized that commercial impracticability only "may be applicable upon the occurrence of a supervening, unforeseen event not within the reasonable contemplation of the parties at the time the contract was made. Such occurrence must go to the heart of the contract." *Burlington Northern and Santa **Fe** Railway Company v. Kansas City **Southern** Railway Company*, 45 F.Supp 2d 847,852 **(D.** Kan. 1999) (citations omitted). *See also Mextel, Inc. v. Air-Shields, Inc.*, *2005* U.S. Dist. Lexis 1281, *82-83 (E.D.Pa. 2005) (rejecting impracticability claim because the occurrence was not unforeseeable).

[22] *Neal-Cooper **Grain** Co.*, 508 F.2d at 293-94 (rejecting impracticability claim after finding that performance may have become burdensome but was not excused). ***See** also Gulf Oil Corporation **v. Federal** Power Commission*, ***563*** F.2d 588, 599 (3d Cir. 1977) (rejecting commercial impracticability claim, finding that "the crucial question . . . is
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financial hardship prong of commercial impracticability can only be satisfied by a case-by-case examination of the actual financial effects on the particular operator seeking modification in each individual case, not in any blanket fashion.[23]

Finally, the terms of a Section 625 modification have to be tailored to each particular franchise. And certain franchise requirements – requirements relating to PEG services, for instance ***(see*** Section 625(e)) – are not subject to modification at all.

In the end, Congress made clear that the Section 625 modification process is a franchise-specific matter to be addressed in operator "negotiations with the franchise authority or in court if an action is taken." *1984* ***House Report*** at 71. It is a process to which the Commission's rulemaking authority is particularly ill-suited, and it is for that reason that Congress never contemplated Commission intervention into it.

II. IF APPLIED TO INCUMBENT CABLE OPERATORS AT ALL, THE *ORDER'S* FINDINGS CANNOT AND SHOULD NOT BE APPLIED BEFORE THE EXPIRATION OF AN INCUMBENT'S CURRENT FRANCHISE AGREEMENT.

Incumbent operators take issue with the *FNPRM's* tentative conclusion that the ***Order's*** findings (at least those that they believe have any applicability) should be applied to incumbents at the expiration of their current franchises, arguing instead that those findings should apply to incumbents immediately.[24] The Commission, however, should spurn the cable industry's entreaties. **As** Verizon noted (at 2), incumbent cable operators "obviously are bound to those

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whether the cost of performance has in fact become so excessive and unreasonable that the failure to excuse performance would result in grave injustice . . ."); *American Trading & Production Corp. v. Shell Int'l Marine Ltd.*, 453 F.2d 939, 942 (2d Cir. 1972) (the party seeking excuse from performance must not only show that he can perform only at a loss but also that the loss will be especially severe and unreasonable).

[23] Commercial impracticability cannot be established without a factual showing. ***See, e.g., Gulf Oil Corporation***, 563 F.2d at 599 ("while repeatedly asserting that the cost of delivering. . . would be 'exorbitant,' [the moving party's] briefs are curiously devoid of citation to supporting evidence in the record").

[24] *See, e.g.*, NCTA Comments at 4, 7 & 20; Time Warner Comments at i, 4 & 15; Charter Comments at 1-2 & 15.

terms [of their existing franchise agreements] until their agreements come up for renewal . . . ." While we do not believe the ***Order's*** findings should apply to incumbents at all, they certainly do not – indeed, cannot – apply to incumbents before their current franchises expire.

A. The Record Establishes That Applying the *Order's* Findings to Incumbents Before Their Current Franchises Expire Would Do More Harm Than Good.

We turn first to the overarching policy and factual considerations that we believe should guide the Commission's decision on whether to apply the *Order's* findings to incumbents before their current franchises expire. These considerations, including relative harms to the parties and equities, tilt heavily in favor of not applying the *Order's* findings to incumbents until their current franchises expire.

1. Incumbents Show No Material Financial Harm That They Would Suffer From Continuing To Comply With Their Current Franchises Until Those Franchises Expire.

Incumbent cable operators show no actual concrete financial harm that they would suffer from continuing to abide by their current franchises until they expire. Simply put, they fail to demonstrate that they will be materially financially harmed by simply continuing to comply with their contractual commitments under their current franchises for the remainder of those franchises' terms.[25]

[25] There are only three potential exceptions. One is the treatment of free service to certain local government locations, schools and libraries, which are discussed in Part II(A)(2) below.

Second, Knology (at 8-12) complains about what it believes are unreasonable demands by the cities of Montgomery and Huntsville, Alabama, during franchise renewal negotiations. As an initial matter, Knology overlooks the obvious: Knology is free under § *626* to refuse to accede to what it thinks are unreasonable franchise renewal requirements, and if it is denied renewal as a result, that denial would be overturned on court appeal if indeed Knology is correct that the LFA's renewal requirements are inconsistent with the Cable Act. That would be true whether or not the *Order* were applied to incumbent cable operators Moreover, many of the requirements about which Knology complains are not inconsistent with the Cable Act at all. There is certainly nothing in the Cable Act suggesting that Knology cannot be required to make the PEG "capital support" payments (at 10) over and

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Incumbent cable operators conveniently seem to forget that the Cable Act provisions on which they purport to rely here have existed in their present form for a long time and were in effect when virtually all current franchises were negotiated. Moreover, incumbent cable operators are very sophisticated and knowledgeable franchise negotiators – indeed, often far more sophisticated and knowledgeable than small LFAs on the other side of the bargaining table – and voluntarily entered into each of their current franchise agreements.[26] There is simply no reason to believe – especially absent evidence to the contrary, of which there is none in this record – that continuing to abide by existing franchise agreements for their remaining term will materially harm incumbent operators in any way.

Equally important, LFAs' reliance on the agreements reflected in their existing franchises is fully justified. In the fifteen years since the 1992 Cable Act, the Commission has never previously construed, or even claimed the authority to construe, Section 621(a)(1) until the fall of 2005 when the original *NPRM* in this proceeding was issued; the Commission has **likewise** never previously construed or claimed the authority to construe Section 611 in the twenty-three years

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above the franchise fee about which Knology complains. And Knology **is** equally wrong in suggesting (at 12) that the Cable Act prohibits LFAs from seeking additional PEG channel capacity at renewal based on community needs. Indeed, Section 626 directly undercuts Knology's position. ***See*** our opening comments at **8;** GMTC Comments at 3-4.

Finally, WOW (at 6-7 n.13) complains about requirements in its Huntington Woods, Michigan, and Chicago Area 5 franchises. Again, many of the requirements about which it complains – PEG capital support payments, prepaid franchise fees, the provision of equipment for use of PEG channels, PEG equipment funds, and the installation of an I-Net fiber backbone – are not inconsistent with the Cable Act. Further, if WOW truly believed that these requirements were so blatantly inconsistent with the Cable Act, the obvious question becomes why it agreed to them in the first place. And it is no answer to suggest that the LFAs somehow forced it to do so. WOW certainly had avenues to challenge the requirements, under Section 621(a)(1) and 622, if it wished. Instead, WOW's complaints are nothing but a transparent attempt to renege on its franchises and to persuade the Commission to renegotiate those franchises for it.

[26] *See, e.g.*, ***Erie Telecommunications v. City of Erie***, 853 F.2d 1084, 1095-97 (3d Cir. 1988) (waiver of First Amendment and Cable Act claims found where cable operator was "second largest cable operator in the nation" and "where the parties to the [franchise] have bargaining equality and have negotiated the terms of the [franchise], and where the waiving party is advised by competent counsel and has engaged in other [franchise] negotiations"). ***Erie*** also teaches that if the franchise fee or other fundamental compensation provision of a franchise were voided, the relief under state law would be recission of the entire franchise, not reformation of it. ***See id.*** at 1091-92 & n.12.

since the 1984 Cable Act was originally enacted; and the Commission has consistently adhered to its franchise fee forbearance policy with respect to Section 622 since it was adopted over twenty years ago.[27] Indeed, it is difficult to imagine circumstances of more justifiable reliance by LFAs.

2. Applying the *Order's* Findings Immediately To Existing Franchises Would Unleash Uncertainty and Additional Litigation and Threaten Substantial Harm to LFAs, Their Residents, and PEG Interests.

While there is nothing in the record suggesting that refraining from applying the ***Order's*** finding to incumbents for the remaining term of their current franchises would cause any significant hardship on incumbent cable operators, there is every reason to believe that applying the ***Order's*** findings immediately to incumbent's current franchise agreements would visit substantial hardship not only on LFAs, but on their residents, PEG centers, and on local schools, libraries, and fire and police departments.

LFAs' and their constituents' hardships stem in no small part from the fact that, because each franchise agreement is worded differently and was agreed to long before the ***Order*** and its particular language could possibly have been foreseen, any attempt to apply the ***Order's*** findings (particularly its franchise fee and PEG/I-Net findings) to existing franchises will invariably result in a host of new disputes, and potential litigation, about whether or not the language in a particular franchise agreement is, or is not, consistent with the ***Order's*** findings. Put a little differently, immediate application of the ***Order's*** findings to existing franchises before their

[27] *See ACLU*, **823** F.2d at 1573-74. That is true with respect to the franchise fee and PEG/I-Net aspects of the ***Order*** for another reason as well: The original ***NPRM*** in this proceeding nowhere suggested, much less invited comments on, the possibility that the Commission would adopt rulings concerning the franchise fee or PEG/I-Net provisions of the Cable Act.

expiration, far from providing guidance and promoting consistency, will result only in increased uncertainty and litigation. And LFAs, PEG centers and subscribers will bear the brunt of that uncertainty, not only in the form of uncertainty as to whether certain benefits in their current franchise agreements will be abruptly lost, but in the form of a substantial increase in litigation costs – costs that many LFAs, and all PEG centers, are far less able to bear than incumbent cable operators. Moreover, the only thing worse than having the disastrous consequences to LFAs and PEG centers arising from the *Order's* findings apply with respect to incumbents upon franchise renewal is to have such drastic consequences apply now, before LFAs and PEG centers even have an opportunity to try to determine what, if anything, can be done to at least partially mitigate the tremendous harms they will suffer.

One aspect of the *Order* that will unquestionably have an immediate and substantially adverse impact on schools, libraries, and fire and police stations across the nation is the *Order's* holding (at ¶ 104) that "free or discounted services provided to an **LFA"** may be a "franchise fee."[28] While we believe this finding, like virtually all of the *Order's* other findings, is directly contrary to the Cable Act and therefore have appealed the *Order,* the fact remains that the vast majority of local franchises in effect today require the incumbent cable operator to provide free basic cable service (and sometimes expanded basic service) to schools, libraries, police and fire stations and certain other local government locations. Indeed, such requirements have been in most franchises for twenty years or more, and to our knowledge, before the *Order* no cable operator has ever claimed that such free service is a "franchise fee" or attempted to offset the value of that free service against franchise fees owed.

[28] We note that some industry commenters have leapt upon this aspect of the ***Order,*** complaining about proposed franchise requirements of providing free basic service to schools. *See, e.g.*, Knology Comments at 10-11.

We also note that the Commission itself apparently once believed that free service to schools was not a franchise fee and, in addition, was "a significant public benefit," having taken pride in requiring Time Warner to provide free service to schools in *Social Contract **for Time** Warner*, 11 FCC Rcd. 2788, 2794 (1995). ***See*** *also id.* at 2818-2821 & 2867-69. The *Order* does not even acknowledge, much less attempt to explain, this glaring inconsistency.

Faced with the alternative of general budget revenue losses that would result if incumbent cable operators were immediately to start to offset the cost of free service to schools, libraries and other public institutions against franchise fees they otherwise owe, some **LFAs** will have no choice but to abandon such free service requirements in existing franchises. That will leave many already cash-strapped local schools and libraries unable to pay to **keep** these services for their students and patrons – a result antithetical to the Commission's stated goals of promoting broadband service availability to schools and libraries. The same is true of many local fire and police departments, who rely on such franchise provisions to provide cable service to their firefighters and police at local fire and police stations.

In short, the balance of hardships that would be suffered if the *Order's* rulings were immediately applied to existing franchises is not even close. The hardships faced by LFAs, PEG centers and their constituents would be substantial, immediate and irreparable. Against that, the record reveals no significant material harms to incumbent cable operators if the *Order's* findings were not applied to them until their current franchises expire,

B. Applying the *Order's* Findings to Existing Franchise Agreements Before They Expire Would Constitute Impermissibly Retroactive Rulemaking and Would Be Arbitrary and Capricious and Otherwise Contrary to Law.

The *FNPRM* wisely does not propose to apply the ***Order's*** findings to incumbent cable operators before their franchises expire. The cable industry's effort to apply these findings to existing franchise agreements is flawed, not only for the equitable, balancing-of-hardships concerns noted above, but also on retroactivity grounds. Applying the ***Order's*** rulings to existing franchise agreements entered into long before this proceeding was even contemplated, much less initiated, would constitute impermissible retroactive rulemaking

As the Supreme Court has long acknowledged,

> "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[29]

Of particular relevance here is that this same retroactivity principle applies with equal force to agency rules as it does to statutes. ***Bowen v. Georgetown University Hospital,*** 488 U.S. 204, 208-09 (1988). "Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." *Id*.

Like the statute at issue in *Bowen*, the Communications Act "provisions establishing the [Commission's] general rulemaking power contain no express authorization of retroactive rulemaking." *Id.* at 213. And applying the ***Order's*** findings to existing franchise agreements

[29] *Landgraf v. USI Film Products,* 511 U.S. 244, 265 (1994) (footnotes omitted).

entered into before the *Order* was adopted would be retroactive. The "legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place."[30]

The relevant "conduct" here is the entry into a franchise agreement by an LFA and an incumbent cable operator. Indeed, a court has so ruled in the closely analogous context of applying Section 621(a)(1)'s prohibition on exclusive franchises, which was added in 1992. In *James Cable Partners* v. *City of Jamestown*,[31] the Sixth Circuit held that *Bowen* barred the application of Section 621(a)(1)'s anti-exclusivity provision to franchises granted before the provision's 1992 enactment. Because *Bowen* applies to agency rules, the same conclusion must apply to the *Order's* applicability to franchises granted before the *Order* was adopted. In reaching this conclusion, the *James Cable* court noted that retroactivity is particularly disfavored in the case of contracts like franchise agreements, because "contractual or property rights" are "matters in which predictability and stability are of prime importance." 43 F.3d at 280 (quoting *Landgraf*, 511 U.S. at 271).

Even assuming *arguendo*, however, that application of the *Order's* findings to existing franchises were not foreclosed by *Bowen* and its progeny, it would still be arbitrary and capricious under the balancing of hardships test that courts applied to rulemakings before *Bowen* was rendered.[32] As we have already shown above in Part II(A), here the balancing of hardships tips decidedly in favor of not applying the *Order's* findings to existing franchise agreements.

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[30] *Landgraj,* 5 II U.S. at 265 (citations omitted).
[31] 43 F.3d 277,279-280 (6th Cir. 1995).
[32] *Bowen,* 488 U.S. at 200 (Scalia, J., concurring) ("A rule that has unreasonable secondary retroactivity – for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule – may for that reason be 'arbitrary' or 'capricious,' see 5 U.S.C. § 706, and thus invalid"). *See also* I R. Pierce, *Administrative Law Treatise* § 6.7, at 361 (4th ed. 2002).

C. Even If the *Order's* Findings Could Legally Be Applied to Existing Franchises, Determining to Apply Them Only at the Expiration of Existing Franchises Is Well Within the Commission's Discretion.

Even if the Commission could permissibly apply the ***Order's*** findings to existing franchise agreements immediately (and we think it cannot), deciding to apply those findings only at the expiration of existing franchises, as the ***FNPRM*** tentatively concludes, is well within the Commission's discretion. Incumbent cable operators have not provided any tenable arguments that the Act somehow compels the Commission to apply the ***Order's*** findings to incumbent franchise agreements immediately, thereby effectively modifying all of those agreements over the objections of the LFAs.

While it is true that Sections 611 and 622 draw no distinction between new-entrant competitive cable operators and preexisting incumbent cable operators, Section 621(a)(1), on the one hand, and Section 626, on the other hand, do draw a distinction between the two: Section 621(a)(1) governs franchises granted to the former, while Section 626 governs the renewal of franchises granted to the latter. More generally, it is well within a regulatory agency's discretion to make reasonable classifications concerning the timing of the applicability of its regulations among entities that it is authorized to regulate.[33]

Given that the balance of hardships weighs heavily in favor of deferring application of the ***Order's*** findings to incumbents until their current franchises expire, there are ample grounds for the ***FNPRM's*** proposed exercise of such discretion here. The immediate harms to LFAs, PEG centers, schools, libraries and others that would ensue if the ***Order*** were applied

[33] ***See**, e.g.*, ***New York v FERC, 535*** U.S. 1, 25-28 (2002); *Transmission Access Policy* ***Study Group v. FERC,*** 225 F.3d 667,694-95 & 720-21 (D.C. Cir. 2000), *aff'd*, 535 U.S. 1 (2002); ***Natural Resources Defense Counsel v. EPA***, 537 F.2d 642,646 (4th Cir. 1976).

immediately to existing franchises would be substantial and immediate. The *FNPRM* therefore properly concluded that the ***Order's*** findings should not apply to incumbents before their current franchises expire.

III. VERIZON'S AND AT&T'S EFFORTS TO CIRCUMVENT SECTION 632(d)(2) FAIL.

Commenters virtually unanimously agree that the Commission should adopt its tentative conclusion concerning Section 632(d)(2). The reason is obvious: That tentative conclusion merely is that Section 632(d)(2) means what it says.

Only two commenters, Verizon and AT&T, sought to sidestep the tentative conclusion, but their efforts simply cannot be squared with the statute. Both try to argue, in one way or another, that state and local cable customer service standards cannot be permitted to "rise to the level of an unreasonable refusal to award a competitive franchise" within the meaning of Section 621(a)(1), and that those standards also cannot be permitted to frustrate Section 706's goal of promoting broadband deployment.[34]

But Verizon and AT&T have it backwards. Nothing in the Communications Act suggests that Section 621(a)(1) or Section 706 trumps Section 632(d)(2). To the contrary, the only way to read Section 632(d)(2) together with Sections 621(a)(1) and 706 is to conclude that Congress has determined in Section 632(d)(2) that state and local customer service laws and franchise cable customer service standards that exceed the Commission's standards do *not*, by definition, constitute an "unreasonable refusal" under Section 621(a)(1), nor do they frustrate broadband deployment within the meaning of Section 706. Any other reading would write Section 632(d)(2) out of the Act, something that the Commission is powerless to do.

[34] **Verizon** Comments at 5&6. ***Accord*** AT&T Comments at 5-7

Moreover, Congress' judgment was a wise one. The record shows that more stringent customer service standards than the Commission's are very much needed in the cable market, even in those markets where head-to-head competition exists.[35] The record therefore fully justifies, even demands, that the Commission adopt its tentative conclusion regarding Section 632(d)(2).

CONCLUSION

For the foregoing reasons and those set forth in our opening comments, the Commission should not adopt the *FNPRM*'s tentative conclusion to extend the ***Order's*** findings to incumbent operators. If the Commission is nevertheless inclined to adopt that tentative conclusion, it should stand by the *FNPRM*'s conclusion not to apply those findings to incumbents until the expiration of their current franchises. The Commission should adopt the *FNPRM*'s tentative conclusion that Section 632(d)(2) prohibits the Commission from preempting state or local customer service laws that exceed the Commission's customer service standards, and from preventing LFAs and operators from agreeing to standards that exceed the Commission's.

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[35] ***See generally*** comments filed by a number of local governments, and particularly the Comments of the Sacramento Metropolitan Cable Television Commission ("SMCTC") regarding poor customer service and lack of follow through actions, at 3-4 (SMCTC has three cable franchise operators within its jurisdiction); Comments of the New Jersey Board of Public Utilities at 6-7; Comments of the League of Minnesota Cities, *et al.* at 12-14; and Comments of Fairfax County at 9-11.

Respectfully submitted,

James N. Horwood
Tillman L. Lay
Gloria Tristani
Ruben D. Gomez
SPIEGEL & MCDIARMID
1333 New Hampshire Avenue, N.W.
Second Floor
Washington, D.C. 20036
(202) 879-4000

Counsel for NATOA et al.

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